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SERVICE DATE - MAY 23, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 590

EXEMPTION FOR RAILROAD AGENT DESIGNATION UNDER 49 U.S.C. 723

AGENCY: Surface Transportation Board.

ACTION: Policy statement on procedure; withdrawal of proposed exemption.

SUMMARY: The Surface Transportation Board (Board) is withdrawing a proposal to exempt rail carriers from the requirement that they designate agents in the District of Columbia on whom the Board may serve decisions and notices in proceedings. The Board is announcing instead a policy change concerning administrative procedure. The Board will no longer serve decisions and notices on designated agents but will continue to make Board decisions and notices available through alternative methods consistent with the statute.

DATES: This change of policy concerning procedure and the withdrawal of the proposed exemption will be effective June 22, 2003.

FOR FURTHER INFORMATION CONTACT: John Sado, (202) 565-1661. [Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: In a notice of proposed exemption served September 26, 2002, and published in the Federal Register on September 27, 2002 (67 FR 61186) (September notice), we proposed to exempt rail carriers providing transportation subject to the Board's jurisdiction from the requirement of 49 U.S.C. 723(a), to designate an agent in the District of Columbia on whom service of notices and actions of the Board may be made.<sup>1</sup> In proposing the exemption, we indicated that designation of, and service on, agents was unnecessary. Such an exemption, we submitted, "would end a duplicative method of giving

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<sup>1</sup> The statute also provides that the Board "shall" serve notices of proceedings and actions "immediately on the agent or in another manner provided by law." 49 U.S.C. 723(c). (Emphasis supplied.) In the absence of a designated agent, the Board can effect service by posting the notice in the Board's office. In proceedings concerning the lawfulness of a rail carrier's rates, practices, or classifications, where there is no designated agent the statute provides that "service of notice . . . on an attorney in fact for the carrier constitutes service of notice on the carrier." 49 U.S.C. 723(d).

notice with resulting cost reduction and efficiency benefits to rail carriers and the Board.” September notice at 4.

The September notice delineated the various methods available for rail carriers to obtain notice of Board actions. We indicated that the Board currently issues the majority of its decisions and/or notices as “regular releases” at 10:30 a.m. and the others, on occasion, as “late releases” at other times later in the day. For regular release, at 10:30 a.m. the official copies of all Board decisions or notices are placed in the Board’s seventh floor Docket File Reading Room (Room 755), where they can be read or photocopied for a fee.<sup>2</sup> Where a rail carrier has a designated agent, a messenger is contacted at about 10:30 a.m. to retrieve a copy of the decision or notice to deliver to a designated agent, and the railroad is billed for the messenger’s cost. If the railroad does not have a designated agent, a copy of the decision is placed on the Board’s first floor bulletin board, located in Suite 100. A copy of the decision is also mailed at about 4:30 p.m. by first class mail to all parties of record in the proceeding. Finally, the decision is put on the Board’s Internet website ([www.stb.dot.gov](http://www.stb.dot.gov)), usually between 10:30 a.m. and 11:30 a.m.<sup>3</sup>

For late releases, as in regular releases, the official copy of the Board decision or notice is placed in the Board’s Docket File Reading Room. Copies of all late releases are also placed on the Board’s first floor bulletin board, whether or not the carrier has a designated agent. Depending on how late in the day the late release occurs, the decision or notice is mailed, a messenger called, and the decision or notice is placed on the Board’s Internet website either on the same day or the next.<sup>4</sup>

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<sup>2</sup> Our practice of placing all notices and decisions in our Docket File Reading Room goes beyond the requirements of maintaining a “reading room” in conformity with the Freedom of Information Act (FOIA), 5 U.S.C. 552, which must contain final decisions in adjudications; statements of policy and interpretation not published in the Federal Register; administrative staff manuals; and records released pursuant to a request under FOIA that have become or are likely to become the subject of a subsequent request. See 49 CFR 1001.1(b). Our Docket File Reading Room makes these reading room documents available – including all decisions and notices in adjudications – and also rulemakings, which are not required to be made available in this way.

<sup>3</sup> The Board maintains an Electronic Reading Room at this website, pursuant to the Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3049 (1996) (EFOIA), containing documents found in the reading room, including final decisions issued on or after November 1, 1996. See 49 CFR 1001.1(d). As in the case of FOIA, supra, the Board, however, goes beyond the requirements of EFOIA and makes documents available in rulemakings as well as adjudications.

<sup>4</sup> The Board also issues an index of its decisions called the “Surface Transportation  
(continued...) ”

In the September notice, we indicated our belief that not serving designated agents was consistent with the statutory scheme. While mandating the designation of agents and the service of decisions and notices, section 723 does not make service on agents the exclusive method of service:

Service on the designated agent appears to be an option and not a requirement. As indicated, section 723(c) states that a Board action “shall be served on the agent or in another manner provided by law,” and section 723(a) indicates that a carrier is required to designate an agent “on whom service . . . may be made.” (Emphasis supplied.) While service is required, serving an agent appears to be only one of the permissible ways of effecting service.

September notice at 4 n.7.

In response to our proposal, we received only one comment, filed by John D. Fitzgerald, for and on behalf of the United Transportation Union-General Committee of Adjustment. (UTU-GCA). UTU-GCA argues that the designation of an agent is not exclusively concerned with the service of a decision or notice on the agent. It claims that many new carriers have been formed in the recent past, and designating agents would facilitate obtaining information about these smaller entities. Moreover, UTU-GCA submits that because, under 49 CFR 1111.3, private parties, and not the Board, serve complaints, eliminating the designated agent would make it more difficult to identify the appropriate individual to serve.

UTU-GCA’s concern is focused on the issue of the designation of, and not service on, agents. It argues that concern about the cost of effecting service is misplaced, because there are alternative means of service available under the statute. UTU-GCA also submits that exempting the designation of agents would bring no cost savings because, under 49 U.S.C. 724, rail carriers still have to designate agents “on whom service of process in an action before a district court may be made.”

UTU-GCA also asserts that the Board does not have the authority under 49 U.S.C. 10502 to grant an exemption from the requirements of section 723, which is in Subtitle I of Title 49, because, it contends, section 10502 applies only to Subtitle IV, Part A of Title 49. In any event, UTU-GCA claims that the exemption criteria of section 10502 are not met because there would be no savings as a result of the proposal, regulation would become more onerous because of the

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<sup>4</sup>(...continued)

Board Daily Releases” (Daily Release), which is placed both in the seventh floor Docket File Reading Room and on the Board’s first floor bulletin board. Each Daily Release index sheet lists all of the decisional documents issued by the Board as of 10:30 a.m. on that day. Late release documents are listed in the Daily Release for the next business day.

difficulties in serving carriers, and the proposal would adversely affect shippers and railroad employees in having to locate carriers.

## DISCUSSION AND CONCLUSIONS

We will withdraw the proposed exemption in light of the UTU-GCA's comments, but we will proceed with adoption of alternative methods of providing for service and notice instead of effecting service on designated agents. Under the statutory scheme of section 723, while designating an agent and serving a notice or decision are mandatory (section 723(a)),<sup>5</sup> serving the notice or decision on a designated agent is not (section 723(c)). A decision or notice must be immediately served on an agent or in another manner provided by law. Id. As UTU-GCA notes, “‘designation’ and ‘service’ are not inextricably intertwined.” UTU-GCA petition at 5. On the record there is opposition to exempting rail carriers from the section 723(a) requirement of designating agents, but no one has objected to our proposal to discontinue the practice of serving designated agents under section 723(c). As noted, UTU-GCA was the only party to file comments, and, while it opposed exempting the designation of agents, its comments appear to support using alternative methods of service under section 723: “[T]here [are] no major expenses for the Board in effecting service under §723 for, as the [September notice] acknowledges, a Board action ‘shall be served immediately on the agent or in another manner provided by law.’” UTU-GCA petition at 5 (emphasis in original) (citation omitted).<sup>6</sup>

Because there may be potential informational benefits from the designation of agents, particularly in the light of the increase in the number of small carriers, we will not exempt rail carriers from the requirement that they designate agents.<sup>7</sup> While our September notice proposed that carriers be exempted from designating agents, our notice was also directed to the serving of the decisions on agents: we indicated that not serving agents would result in cost reductions and efficiency benefits for rail carriers and the Board, that service on agents was not a requirement because alternative methods of service were permitted; and the Board was in fact making

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<sup>5</sup> In reviewing our list of designated agents, it appears that some of the information is out of date and that a number of carriers have not designated agents. We request that the carriers provide the necessary information.

<sup>6</sup> We agree with UTU-GCA that there is no “inextricable” linkage between designation and service, because, while designation is mandatory, the statute does not require service on agents if an alternative service method is effected. Our September notice described why we believed that that result would have been consistent with the statute.

<sup>7</sup> Because we believe that retention of designated agents would serve a useful purpose, we will withdraw the proposed exemption without deciding the issue of whether a provision of Subtitle I of Title 49 can be exempted under 49 U.S.C. 10502.

decisions and notices available through first class mail, our Docket File Reading Room, our Internet website, and, for late releases and where no agent is designated, our first floor bulletin board.

We find that the grounds for not serving decisions and notices on agents are still valid. Moreover, no one has objected to not serving agents, and the only filed comment appears to support this. Accordingly, we are announcing a change in policy and will no longer serve decisions and notices on designated agents but will rely on the alternative methods of service and notice. We believe that making decisions and notices available in this manner is consistent with the requirement of section 723(c) that, as an alternative to service on designated agents, service may be made “in another manner provided by law.”

The statute does not explicitly define what “in another manner provided by law” means. It does, however, list alternative methods of service where no agent is designated: posting a notice in the Board office (section 723(c)) and service on a carrier’s attorney in cases involving rate lawfulness (section 723(d)). We note that, consistent with these, the Board posts notices for all late releases, as well as cases where no agent is designated, and all decisions are mailed by first class mail to all parties of record. Moreover, Rule 5(b)(2)(B) of the Federal Rules of Civil Procedure (FRCP) provides that service of court orders may be made by “[m]ailing a copy to the last known address of the person served.”<sup>8</sup> We also make official copies of all Board decisions and notices available in the Docket File Reading Room, which goes beyond the requirements of FOIA (5 U.S.C. 552). We also make these decisions and notices available on our Internet website, which also exceeds the requirements of EFOIA (5 U.S.C. 552(a)(2)(E)). As noted in our September notice, the availability of decisions and notices on the Internet usually provides faster notice than messenger delivery to designated agents.<sup>9</sup> We believe that these alternative methods of service and notice are consistent with the requirement under section 723(c) that, if service is not immediately made on a designated agent, it be made in another lawful manner.

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<sup>8</sup> The FRCP were issued in original form through joint action of Congress and the United States Supreme Court. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433 (1956). “[T]he Federal Rules of Civil Procedure, like any other statute, should be given their plain meaning.” Berkeley Inv. Group, LTD. v. Colkitt, 259 F.3d 135, 143 n.7 (3rd Cir. 2001) (citations omitted).

<sup>9</sup> Section 723(c) provides that, when service is made on a designated agent, it shall be done “immediately.” In many cases, the decision or notice is available on our website before the agent receives it.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: May 15, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams  
Secretary